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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HYPERDISK MARKETING, INC.,	
Plaintiff and Respondent,	G051350
v.	(Super. Ct. No. 30-2014-00735444)
COSTA MESA CONFERENCE AND VISITOR BUREAU,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, John C. Gastelum, Judge. Reversed.

Snell & Wilmer, William S. O'Hare, Todd E. Lundell and Jeffrey M. Singletary for Defendant and Appellant.

Simon & Simon, Jeffrey S. Simon and David A. Simon for Plaintiff and Respondent.

* * *

Defendant and appellant Costa Mesa Conference and Visitor Bureau (Bureau) appeals from an order denying its special motion to strike plaintiff and respondent Hyperdisk Marketing, Inc.'s (Hyperdisk) complaint under the anti-SLAPP statute, Code of Civil Procedure, section 425.16.[1] The trial court denied the motion because it found Hyperdisk met its burden to establish a probability of prevailing on its malicious prosecution claim by showing the Bureau lacked probable cause to bring its earlier lawsuit against Hyperdisk and acted with malice in bringing that lawsuit.[2] Although we agree Hyperdisk presented sufficient evidence to make a prima facie showing the Bureau lacked probable cause for its lawsuit, we disagree Hyperdisk made a prima facie showing the Bureau maliciously brought its lawsuit for a purpose other than vindicating its rights. We therefore reverse.

I

FACTS AND PROCEDURAL HISTORY[3]

Hyperdisk is an international strategic consulting, technology, and digital marketing agency. The Bureau is a nonprofit corporation formed primarily to attract leisure and business travelers to the City of Costa Mesa. The Bureau's 12-member board of directors includes the general manager from each of the 10 major hotels located in the

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] The parties agreed Hyperdisk satisfied the third and final element of its malicious prosecution claim—a legal termination of the earlier lawsuit in Hyperdisk's favor.

[3] Our summary of the facts and procedural history reflects the governing standard of review. As explained below, that standard requires us to accept as true the evidence favorable to Hyperdisk and evaluate the Bureau's evidence only to determine if it has defeated Hyperdisk's claims as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

city and two city employees. The board approves the budgets, contracts, and other significant transactions, but the Bureau's executive director manages the day-to-day operations.

In 2006, the Bureau hired Hyperdisk to develop the Bureau's Web site. The two entities agreed on a written contract, but no one from either organization could recall whether they signed the contract and no one could locate a signed copy. The contract called for the Bureau to make four installment payments of slightly more than $12,000 for Hyperdisk to develop and build the Bureau's Web site. The contract also stated Hyperdisk may perform "[o]ngoing monthly marketing services, consulting and reporting," and "[m]aintenance and service," but Hyperdisk would obtain the Bureau's approval before performing any work beyond the Web site development services described in the contract, and Hyperdisk would bill for those additional services either at $125 per hour or the rate identified on an attached "service grid."

After Hyperdisk completed the Bureau's Web site, it prepared a detailed strategic e-marketing plan for the Bureau designed to increase the city's Internet exposure and bookings at the city's hotels. The plan included an annual budget comprised of five categories: (1) pay-per click ads and search marketing, which included search engine optimization; (2) travel and trade portal marketing; (3) Web site improvements; (4) e-mail marketing and database management; and (5) consulting, tracking, and support. Hyperdisk broke each of these categories down into subcategories and proposed to spend a monthly amount for each subcategory. Although the budget proposed higher amounts for several categories in the first month, and some categories only included expenditures every other month or quarterly, the budget generally proposed the same monthly amount for each subcategory.

Based on this proposal, the Bureau's part time executive director, Diane Pritchett, negotiated an arrangement with Hyperdisk's president, Steven Seghers, for Hyperdisk to provide the Bureau a wide variety of e-marketing and other services,

including search and display advertising, creative design, Web site updates, e-mail distribution and hosting, database marketing, consulting, ongoing reporting, search engine optimization, media placement, local listings, strategy, Web site hosting, information technology assistance, and other support services. Although the arrangement was based on the strategic plan and budget Hyperdisk prepared, the parties did not execute a written agreement. Instead, each year Hyperdisk would prepare a new plan and budget and the Bureau's board would approve the total amount the Bureau could spend on those services during the year. The board did not specifically approve the individual categories and subcategories included in Hyperdisk's annual budgets, but rather allowed Hyperdisk to work with the Bureau during the year to determine how best to spend the overall budget to achieve the Bureau's goals. According to Hyperdisk, it had discretion to determine how much to spend each month and how to spend it.

Seghers and other Hyperdisk employees regularly met not only with the Bureau's staff but also with the board and its marketing and steering committees to report on the results of Hyperdisk's efforts and to plan the specific ad campaigns and other services Hyperdisk would provide in the future. Hyperdisk's reports provided live data analytics on Web site traffic and the results of e-mail and other marketing campaigns. Hyperdisk invoiced the Bureau on a monthly basis based on the amounts and categories identified in the approved budget and any adjustments or changes made during the year. The invoices, or at least most of the categories in the invoices, were often the same from month to month. Hyperdisk billed the amount designated in the budget, and the categories of services identified on the invoices were the same categories identified in the budget. Other than the title of the categories, the invoices provided little or no description of Hyperdisk's work. Pritchett approved and the Bureau paid each monthly invoice because the invoices were consistent with what Pritchett expected to receive from Hyperdisk and the board was happy with the results.

Seghers testified Hyperdisk billed all of its customers, including the Bureau, a flat monthly fee based on the budgeted amount for each month. That fee included its out-of-pocket expenditures to place ads with various Web sites and Hyperdisk's compensation for the various services it provided. Thomas Smalley, president of the Bureau's board from 2003 to 2008, testified he was involved in the discussions leading to the Bureau's arrangement with Hyperdisk, he was familiar with the terms of that arrangement, and he signed the checks to pay Hyperdisk's monthly invoices during his tenure. According to Smalley, the Bureau expected Hyperdisk to bill a fairly consistent amount each month regardless of the amount of work performed because the Bureau lacked sufficient revenue to pay significantly higher invoices that otherwise would arise during busy ad campaigns. To accomplish this, Smalley explained, Hyperdisk essentially would average its bills over the course of the year as provided in the budget. Michael Mustafa was not a member of the Bureau's board, but he served as the co-chair for the Bureau's marketing committee during 2007 and 2008. He testified Hyperdisk provided its services on a fixed fee basis based on the approved annual budget.

In 2010, the Bureau hired a fulltime president, Paulette Lombardi-Fries, to replace its long-tenured, part time executive director, Pritchett. Fries began in August 2010, and Pritchett stayed on to help with the transition through October 2010. Fries had no prior experience with e-marketing or e-commerce. Although the Bureau had been operating under its arrangement with Hyperdisk for four years when Fries started, she could not locate a contract or file regarding that arrangement. Pritchett provided Fries with miscellaneous materials about Hyperdisk, but Fries never asked Pritchett about the Bureau's arrangement with Hyperdisk or otherwise discussed Hyperdisk with Pritchett. Fries only knew Hyperdisk "was doing a series of things for the Bureau, which included updates to the Web site, e-mail blasts, banner ads, paid search, and [search engine optimization]."

As the Bureau's president, Fries's responsibilities included approving invoices for Hyperdisk and other vendors. During her first few months, Fries approved Hyperdisk's invoices even though she did not know what services or work product Hyperdisk was required to provide or how Hyperdisk's compensation was determined. She discovered the amount Hyperdisk billed for many of the categories of services identified on its invoices was the same each month based on the budget, but she did not know whether those services were billed at an hourly, out-of-pocket, or flat-fee basis because she did not have a contract specifying the payment terms. For example, she recognized the amount billed for pay-per-click ads was the same each month even though she knew it was impossible for the Bureau's ads to receive the identical number of clicks several months in a row. Moreover, she knew Hyperdisk provided technical support for the Bureau's computers, e-mail, and Web site, but she did not know what category on the invoices covered those services or how they were billed. Similarly, Fries knew Seghers and other Hyperdisk representatives regularly attended board and other meetings with the Bureau and prepared various reports for the Bureau, but she did not know which categories on the invoices covered that work.

Fries sent Seghers several e-mails asking him to explain certain entries on the invoices. Seghers responded with brief explanations and offered to discuss the matter in further detail. Fries, however, never asked Seghers to describe the parties' agreement concerning Hyperdisk's specific work or how Hyperdisk billed the Bureau for that work. Fries asked the Bureau's executive committee—Shaun Robinson, Debbie Snavely, Susan O'Brien-Moore, and Mike Hall—to describe the specific services the Bureau was supposed to receive for compensating Hyperdisk, but none of them knew the terms of the arrangement. Hall explained the board relied on Pritchett as the Bureau's executive director to know what was required and to notify the board if Hyperdisk failed to perform.

In February 2011, Fries hired Kiranjit Glen as the Bureau's marketing manager. As Glen's first assignment, Fries asked her to "understand what Hyperdisk did for us and ask questions." Glen exchanged several e-mails with Seghers and other Hyperdisk employees seeking proof of Hyperdisk's performance, including copies of the Internet ads Hyperdisk placed for the Bureau and statistics about the Bureau's Web site and various advertising campaigns Hyperdisk had conducted. Although Glen believed Hyperdisk failed to provide all of the information she requested and altered some of the examples it provided, she did not ask Seghers, anyone else at Hyperdisk, or anyone at the Bureau to describe the contract terms between the Bureau and Hyperdisk. Glen testified that she did not know the basis for Hyperdisk's invoices and she "didn't feel the need to." Nonetheless, two weeks after starting with the Bureau, Glen made a PowerPoint presentation to the board recommending the Bureau terminate its relationship with Hyperdisk because the Bureau was not getting what it paid for.

Following Glen's presentation, the Bureau suspended certain portions of the services Hyperdisk provided before terminating its relationship with Hyperdisk in April 2011. In doing so, the Bureau demanded that Hyperdisk provide a wide variety of information about the Bureau's Web site, Hyperdisk's advertising campaigns, and the other services Hyperdisk provided. For several months, the parties discussed the Bureau's requests for proof Hyperdisk completed the work listed in its billings. At one point, Hyperdisk allegedly provided the nonproprietary and nonconfidential information the Bureau sought. Initially satisfied, the Bureau tendered payment for Hyperdisk's final invoice, but quickly stopped payment on its check after reviewing the information because it concluded Hyperdisk did not provide everything the Bureau sought.

Although neither the Bureau's board members nor Fries knew the terms of the Bureau's arrangement with Hyperdisk, the Bureau concluded it paid Hyperdisk for services it did not perform because Hyperdisk failed to provide all of the proof of performance the Bureau sought and appeared to falsify some of the proof it provided. As

part of the Bureau's investigation into Hyperdisk's billings, its attorneys twice spoke with Pritchett and drafted for her declarations that explained the contract required Hyperdisk to spend the money as allocated to each category of services in the budgets and Hyperdisk had no authority to vary from that by performing more or less work. Pritchett refused to sign the declarations, but no evidence was presented to explain why. She later testified she did not think Hyperdisk overcharged the Bureau for any of its services.

In July 2012, the Bureau filed a lawsuit alleging Hyperdisk collected fees for work it never performed. The Bureau's complaint alleged claims for breach of written contract based on the unsigned 2006 contract to develop the Bureau's Web site, fraud based on alleged misrepresentations in Hyperdisk's invoices, and unjust enrichment based on the Bureau's payments for services Hyperdisk did not perform. The complaint sought more than $100,000 in compensatory damages and $5 million in punitive damages. A jury returned a 9-to-3 verdict in Hyperdisk's favor on all causes of action. Based on the verdict, the trial court entered judgment against the Bureau.

In July 2014, Hyperdisk filed this lawsuit against the Bureau alleging a malicious prosecution claim based on the Bureau's earlier lawsuit.[4] The Bureau responded with an anti-SLAPP motion seeking to strike Hyperdisk's complaint. The Bureau argued Hyperdisk based its malicious prosecution claim on the Bureau's protected petitioning activities and Hyperdisk could not show a probability of prevailing because the Bureau had probable cause to bring the earlier lawsuit and did not act with malice. In support, the Bureau presented evidence describing its investigation into Hyperdisk's services and invoices, which purportedly showed Hyperdisk failed to provide proof it performed all of the services billed to the Bureau, and also falsified some

[4] Hyperdisk also alleged claims for abuse of process, defamation, breach of the covenant of good faith and fair dealing, and violation of Business and Professions Code section 17200, et seq. The trial court granted the Bureau's anti-SLAPP motion on these other claims and Hyperdisk did not challenge that ruling.

of the evidence it provided to establish its performance. According to the Bureau, it expected Hyperdisk to bill only for the work it performed. The Bureau claimed it had no knowledge about Hyperdisk's alleged flat fee billing arrangement because Hyperdisk never told the Bureau that was the billing arrangement until well after the Bureau filed its lawsuit.

Hyperdisk presented evidence the Bureau lacked probable cause to bring the earlier lawsuit because the Bureau agreed to a flat fee arrangement that did not require Hyperdisk to perform any specific quantum of work each month and Hyperdisk provided proof it performed all of its obligations under the parties' agreement. Hyperdisk also presented evidence Pritchett knew the terms of the parties' arrangement, but the Bureau never asked her about those terms before filing its lawsuit, which accused Hyperdisk of fraud even though the Bureau did not know what work the parties' arrangement required Hyperdisk to perform or how Hyperdisk was to be paid for its work.

The trial court denied the motion and this appeal followed.

II

DISCUSSION

A. *Governing Anti-SLAPP Principles*

A SLAPP suit is a meritless lawsuit brought primarily to chill or punish a defendant's exercise of the constitutional rights of freedom of speech and petition for redress of grievances. A SLAPP plaintiff is not concerned with prevailing in the lawsuit, but rather seeks to "'deplete "the defendant's energy" and drain "his or her resources"'" by forcing a litigant to defend a meritless lawsuit. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463 (*Hecimovich*).)

Recognizing a disturbing increase in these abusive lawsuits, the Legislature enacted section 425.16 """"to prevent SLAPPs by ending them early and without great

cost to the SLAPP target'"" (*Hecimovich*, *supra*, 203 Cal.App.4th at p. 463.) The statute "'establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Ibid*.; see *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737 (*Jarrow*) [anti-SLAPP statute "is a procedural device for screening out meritless claims"].)

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

This statutory language requires courts to utilize a two-step process when deciding an anti-SLAPP motion. ""'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue.'"" (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1535 (*Jay*).)

Here, there is no dispute Hyperdisk's malicious prosecution claim arises from protected activity. "The plain language of the anti-SLAPP statute dictates that every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 (*Daniels*); see *Jarrow*, *supra*, 31 Cal.4th 728, 734-735.)

Once a moving party defendant makes the initial showing that a cause of action arises from protected activity, "the burden shifts to the plaintiff to demonstrate a probability of prevailing on the cause of action." (*Donovan v. Dan Murphy Foundation*

(2012) 204 Cal.App.4th 1500, 1505 (*Donovan*).) "[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether 'the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim' (italics added), past cases interpreting this provision establish that the Legislature did not intend that a court . . . would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)

"'[S]ection 425.16 is analogous to other statutes requiring the plaintiff to make a threshold showing, which are aimed at eliminating meritless litigation at an early stage.'" (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 211.) "Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech [or petitioning] concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700 (*Overstock.com*).) "The plaintiff's cause of action needs to have only '"minimal merit" [citation]' to survive an anti-SLAPP motion." (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1105 (*Cole*); see *Soukup*, *supra*, 39 Cal.4th at p. 291; *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 530 (*Integrated Healthcare*) ["We are inclined to allow the plaintiff in a SLAPP motion a certain degree of leeway in establishing a probability of prevailing on its claims due to 'the early stage at which the motion is brought and heard [citation] and the limited opportunity to conduct discovery'"].)

To establish a probability of prevailing, a plaintiff need only '"demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.]' [Citation.] '"We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.]

However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'"" (*Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 684 (*Roger Cleveland*), disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239; see *Soukup, supra*, 39 Cal.4th at p. 291.) "'[T]he defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.'" (*Daniels, supra*, 182 Cal.App.4th at p. 215.)

"On appeal, we 'review an order granting [or denying] an anti-SLAPP motion de novo, applying the same two-step procedure as the trial court.'" (*Jay, supra*, 218 Cal.App.4th at p. 1536.)

B. *Hyperdisk Failed to Establish a Probability of Prevailing on All Elements of Its Malicious Prosecution Claim*

To establish a claim for malicious prosecution, a plaintiff must plead and prove (1) an earlier lawsuit was pursued to a legal termination in the plaintiff's favor; (2) the defendant brought the earlier lawsuit without probable cause; and (3) the defendant initiated that lawsuit with malice. (*Soukup, supra*, 39 Cal.4th at 292; *Jay, supra*, 218 Cal.App.4th at p. 1539.) "Continuing an already filed lawsuit without probable cause may also be the basis for a malicious prosecution claim." (*Jay*, at p. 1539.) Here, the parties agree the earlier lawsuit legally terminated in a judgment favorable to Hyperdisk. We therefore focus on the latter two elements, concluding Hyperdisk made a prima facie showing to support the lack of probable cause element, but failed to make a sufficient showing on the malice element.

1. Hyperdisk Made a Prima Facie Showing the Bureau Lacked Probable Cause for the Earlier Lawsuit

a. *Governing Probable Cause Principles*

"'A litigant will lack probable cause for his action *either* if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.'" (*Soukup*, *supra*, 39 Cal.4th at p. 292, italics added; see *Jay*, *supra*, 218 Cal.App.4th at pp. 1540-1541.) "Probable cause . . . must exist for every cause of action advanced in the underlying action." (*Soukup*, at p. 292.)

"[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an objective standard to the facts on which the defendant acted." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878 (*Sheldon Appel*); see *Jay*, *supra*, 218 Cal.App.4th at p. 1540.) The defendant's subjective belief regarding the legal tenability of the claims alleged is irrelevant. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*); see *Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195 (*Puryear*).)

"""'[P]robable cause to bring an action does not depend on it being meritorious, as such, but upon it being arguably tenable, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable.'""" (*Jay*, *supra*, 218 Cal.App.4th at p. 1540.) """[P]robable cause is lacking 'when a prospective plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.'""" (*Daniels*, *supra*, 182 Cal.App.4th at p. 222; see *Puryear*, *supra*, 66 Cal.App.4th at p. 1195.) "Only those actions that '"any reasonable attorney would agree [are] totally

and completely without merit"' may form the basis for a malicious prosecution suit." (*Wilson, supra,* 28 Cal.4th at p. 817; see *Roger Cleveland*, *supra*, 225 Cal.App.4th at p. 685.)

The application of this objective standard is a legal question for the court. "The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is a significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim." (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 875.)

Although """[w]hat facts and circumstances amount to probable cause is a pure question of law[, w]hether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury."""" (*Sheldon Appel, supra,* 47 Cal.3d at p. 877; see *id*. at p. 881 ["when . . . there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding"]; *Daniels*, *supra,* 182 Cal.App.4th at pp. 222-223.)

b. *Hyperdisk's Showing*

The Bureau contends the trial court erred in denying the anti-SLAPP motion because the Bureau's evidence established probable cause for each of its causes of action in the earlier lawsuit, and therefore Hyperdisk cannot establish the essential element that the Bureau lacked probable cause. Not so. Hyperdisk presented sufficient evidence to show the Bureau lacked probable cause and the Bureau's argument to the contrary is based on a misunderstanding of the legal standards governing its anti-SLAPP motion.

In the earlier lawsuit, the Bureau sued Hyperdisk for breach of written contract, fraud, and unjust enrichment. The Bureau alleged Hyperdisk breached the contract the parties entered into in 2006, as annually renewed, by billing for some agreed-upon services it did not provide. The Bureau further alleged Hyperdisk defrauded the Bureau by submitting monthly invoices that falsely represented Hyperdisk had rendered all services billed in the invoices. Finally, the Bureau alleged it unjustly enriched Hyperdisk by paying for services Hyperdisk never rendered. The second step of the anti-SLAPP analysis therefore required Hyperdisk to establish its malicious prosecution claim had at least minimal merit by making a prima facie showing of facts that, if credited, established the Bureau lacked probable cause to assert at least one of these three causes of action. (See *Soukup*, *supra*, 39 Cal.4th at p. 291; *Roger Cleveland*, *supra,* 225 Cal.App.4th at p. 684; *Overstock.com, supra,* 151 Cal.App.4th at pp. 699-700.)

Hyperdisk presented evidence showing its arrangement with the Bureau required it to provide a wide variety of e-marketing, consulting, and other technical and support services based on an approved annual budget. The arrangement did not specify Hyperdisk would bill at a designated hourly rate for the actual time spent, that it would charge specific amounts for the various individual tasks it performed, or that it would perform a certain quantum of work or purchase a specific amount of advertising space. Rather, the arrangement called for Hyperdisk to provide services in several broad categories and to bill the Bureau monthly at a flat rate for each category of services as provided in the approved budget and regardless of how much time or money Hyperdisk spent. Under this arrangement, Hyperdisk regularly met with the Bureau's board and its various committees to discuss Hyperdisk's work and plan future projects. Hyperdisk's president, Seghers, testified to this arrangement and explained it was the standard billing method Hyperdisk used with all of its customers. Pritchett, the Bureau's executive director who negotiated the arrangement, and Smalley, the president of the Bureau's

board of directors when it entered into the arrangement, confirmed this was the arrangement with Hyperdisk.

Hyperdisk also presented evidence that when the Bureau decided to terminate its arrangement with and later sue Hyperdisk, Fries, the Bureau's president who replaced Pritchett, Glen, the Bureau's new marketing manager, and the Bureau's entire board did not know the terms of the Bureau's arrangement with Hyperdisk. Nor did they know the specific services and quantity of services the arrangement required Hyperdisk to provide, or how Hyperdisk calculated its fees for the services it performed. Hyperdisk also pointed to evidence showing the Bureau had no file or other documentation regarding its relationship with Hyperdisk when Fries started working with the Bureau in 2010, and although Fries asked Seghers to explain some of the specific entries on some invoices, she never asked him to explain the specific terms of the parties' arrangement. Hall, the president of the Bureau's board when it decided to sue and a board member throughout the duration of the Bureau's relationship with Hyperdisk, testified that he and the rest of the board relied on Pritchett to know the terms of the arrangement and make sure Hyperdisk properly performed. Hall also testified he suggested Fries and the Bureau's attorneys speak with Pritchett before filing suit.

Finally, Hyperdisk's evidence shows Fries never spoke with Pritchett about Hyperdisk or its arrangement with the Bureau. Before the Bureau sued Hyperdisk, its attorneys twice spoke with Pritchett and drafted proposed declarations explaining Hyperdisk's alleged failure to properly perform under the parties' contractual arrangement. Pritchett, however, refused to sign either declaration. No evidence was presented to show whether the Bureau's attorneys asked her why she would not sign the declarations, but she later testified the declaration did not accurately describe the parties' arrangement and she did not believe Hyperdisk overcharged the Bureau.

When accepted as true, this evidence establishes a prima facie case that the Bureau's claims lacked probable cause because the Bureau had no reasonable basis to

believe the facts it alleged were true or that the evidence to support those alleged facts could be obtained. (See *Soukup, supra,* 39 Cal.4th at p. 292; *Daniels, supra,* 182 Cal.App.4th at p. 222; *Overstock.com, supra,* 151 Cal.App.4th at pp. 699-700.) Indeed, this evidence shows the Bureau sued Hyperdisk for breach of contract and fraud based on Hyperdisk's nonperformance under the parties' contractual arrangement, but the Bureau did not know what that arrangement required Hyperdisk to do or how Hyperdisk would bill for its services, and the only person affiliated with the Bureau who knew the terms of the parties' arrangement—Pritchett—twice refused to sign a declaration that would have supported the Bureau's claims.

The Bureau contends the evidence it presented was "sufficient to establish probable cause" for the earlier action, and therefore required the trial court to grant the anti-SLAPP motion. According to the Bureau, its evidence showed Hyperdisk never asserted its flat fee theory of the parties' arrangement until well after the Bureau filed its lawsuit, and the information available to the Bureau when it filed the lawsuit showed Hyperdisk had not provided adequate proof it performed all of the services for which it billed and falsified some of the proof of performance it provided. In support, the Bureau points to evidence showing the parties' communications before the lawsuit, the investigation the Bureau conducted before it filed the lawsuit, a report its consultant prepared about Hyperdisk's performance, and Hyperdisk's budgets and invoices. The Bureau also emphasizes Pritchett's testimony that she did not tell its attorneys why she refused to sign the declarations.

The Bureau's evidence, however, is largely irrelevant at this stage of the proceedings. The issue here is not whether the Bureau could establish probable cause, but whether Hyperdisk could establish a prima facie case that the Bureau lacked probable cause. (§ 425.16, subd. (b)(1); *Donovan, supra,* 204 Cal.App.4th at p. 1505.) In answering that question, we must accept Hyperdisk's evidence as true, and we look to the Bureau's evidence only to determine whether it defeats Hyperdisk's malicious

prosecution claim as a matter of law by either establishing a complete defense or negating an essential element. (*Soukup, supra,* 39 Cal.4th at p. 291; *Roger Cleveland, supra,* 225 Cal.App.4th at p. 684; *Daniels, supra,* 182 Cal.App.4th at p. 215.) The Bureau's evidence did neither.

Whether Hyperdisk asserted its flat fee theory when the parties' disagreement first arose or well after the Bureau filed its lawsuit does not alter the fact the Bureau sued for breach of contract and fraud without knowing the terms of the parties' contractual arrangement. Similarly, Pritchett's failure to tell the Bureau's attorneys why she would not sign the declarations does not change the fact Pritchett was the only person affiliated with the Bureau with knowledge of the parties' contractual arrangement, and she twice refused to sign declarations asserting the facts necessary to establish the Bureau's claims.[5]

At best, the Bureau established a conflict in the evidence about what the Bureau knew and whether it had probable cause to commence and maintain its earlier lawsuit, but we may not resolve that conflict in an anti-SLAPP motion because the governing standard prohibits us from either weighing credibility or comparing the weight of the evidence. (See *Soukup, supra,* 39 Cal.4th at p. 291; *Roger Cleveland, supra,* 225 Cal.App.4th at p. 684; see also *Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 464-465 (*Greene*) [conflict in evidence required court to deny anti-SLAPP motion].) Moreover, even if the Bureau's evidence supported a judgment in its favor and far

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[5] In ruling on the Bureau's anti-SLAPP motion, the trial court sustained Hyperdisk's evidentiary objections to much of the evidence the Bureau presented to establish probable cause. The Bureau contends the trial court abused its discretion in sustaining those objections because the evidence was admissible to show the Bureau's knowledge when it filed the earlier lawsuit. We need not decide whether the trial court properly excluded this evidence because the Bureau's evidence is largely irrelevant under the governing anti-SLAPP standards as explained above. Indeed, assuming arguendo the trial court erred in excluding the Bureau's evidence, admitting the evidence would not undermine Hyperdisk's prima facie showing the Bureau lacked probable cause.

outweighed Hyperdisk's evidence, we may not properly overturn the trial court's decision denying the Bureau's anti-SLAPP motion. As explained above, Hyperdisk presented sufficient evidence to make a prima facie showing the Bureau lacked probable cause when Hyperdisk's evidence is credited, and the evidence the Bureau presented did not defeat Hyperdisk's evidence as a matter of law. (See *ibid*.)

To defeat an anti-SLAPP motion under section 425.16, a plaintiff's claims need have only minimal merit because the statute calls for an early judicial evaluation of the plaintiff's claims and limits the plaintiff's opportunity to conduct discovery before opposing an anti-SLAPP motion. (*Soukup*, *supra*, 39 Cal.4th at p. 291; *Overstock.com*, *supra*, 151 Cal.App.4th at pp. 699-700; *Integrated Healthcare*, *supra*, 140 Cal.App.4th at p. 530.) The anti-SLAPP statute's purpose is not to eliminate all claims arising from constitutionally protected speech or petitioning activities, but rather to eliminate only meritless claims brought primarily to chill or punish the exercise of those rights. (See *Hecimovich*, *supra*, 203 Cal.App.4th at p. 463.) That purpose is satisfied and the analysis ends once a plaintiff establishes his or her claims have at least minimal merit.

Finally, the Bureau contends the trial court erred in finding it lacked probable cause because the court (1) relied on the alleged inadequacy of the Bureau's pre-lawsuit investigation into the parties' contractual arrangement, and (2) imputed Pritchett's, Smalley's, and other former employees' and board members' knowledge about the Hyperdisk arrangement to the Bureau. According to the Bureau, whether probable cause existed is determined based on the Bureau's knowledge when it filed the lawsuit, not the adequacy of any pre-lawsuit investigation, and any knowledge former officers, board members, agents, or employees may have had about the parties' contractual arrangement may not be imputed to the Bureau where, as here, there is no evidence showing those individuals shared their knowledge with the Bureau. We need not address either of these contentions.

Under the governing de novo standard of review, we independently review the trial court's decision to deny the Bureau's anti-SLAPP motion, not its stated reasons for that ruling. (*Jay*, *supra*, 218 Cal.App.4th at p. 1536; see *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1034, fn. 5.) We conduct the same two step anti-SLAPP analysis as the trial court and conclude Hyperdisk met its burden to present evidence making a prima facie showing the Bureau lacked probable cause in bringing the earlier lawsuit. That conclusion does not rely on any alleged inadequacy in the Bureau's investigation or impute to the Bureau any knowledge possessed by a former officer, director, employee, or agent.

2. Hyperdisk Failed to Make a Prima Facie Showing the Bureau Acted With Malice in Bringing the Earlier Lawsuit

a. *Governing Malice Principles*

"'"'The malice element of the malicious prosecution tort goes to the defendant's subjective intent. . . . It is not limited to actual hostility or ill will toward the plaintiff." [Citation.] It can exist, for example, where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence. [Citation.] Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.'" (*Silas v. Arden* (2012) 213 Cal.App.4th 75, 90 (*Silas*); see *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.)

"'Merely because the prior action lacked legal tenability, as measured objectively, i.e., by the standard of whether any reasonable attorney would have thought the claim tenable [citation], *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective

malicious state of mind. In other words, the presence of malice must be established by other, additional evidence. [¶] . . . [T]hat evidence must include proof of either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant.'" (*Silas, supra*, 213 Cal.App.4th at pp. 90-91; see *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498-499.)

"This additional proof may consist of evidence that the prior case was knowingly brought without probable cause or was brought to force a settlement unrelated to its merits." (*Cole, supra*, 206 Cal.App.4th at p. 1114.) Indeed, "a plaintiff acts with malice when he asserts a claim with *knowledge of its falsity*, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.'" (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 452 (*Drummond*); see *Greene, supra*, 216 Cal.App.4th at pp. 464-465; *Daniels, supra*, 182 Cal.App.4th at p. 226.)

"'Suits with the hallmark of an improper purpose' include 'those in which: "'. . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; [and] (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.'"'" (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 685.)

"[A] malicious prosecution plaintiff must plead and prove actual ill will, some ulterior motive, or that the proceeding was initiated for an improper purpose." (*Roger Cleveland, supra*, 225 Cal.App.4th at p. 684.) The existence of malice is a question of fact for the jury. (*Sheldon Appel, supra*, 47 Cal.3d at pp. 874-875; *Drummond, supra*, 176 Cal.App.4th at p. 452.)

b. *Hyperdisk's Showing*

The Bureau contends the trial court erred by denying its anti-SLAPP motion because Hyperdisk failed to meet its evidentiary burden showing the Bureau maliciously brought the earlier lawsuit. We agree. Although Hyperdisk submitted substantial evidence in opposing the motion, none of it establishes or supports an inference the Bureau acted with malice in bringing its lawsuit.

Hyperdisk first points to the same evidence on which it relied to make a prima facie showing the Bureau lacked probable cause for its claims. According to Hyperdisk, "the reckless lack of probable cause detailed herein-above . . . is more than sufficient at this stage" to establish malice because knowingly alleging a claim that lacks probable cause supports an inference of malice. Hyperdisk is mistaken. Recklessness as to whether probable cause exists is not the equivalent of knowingly bringing a claim that lacks probable cause.

As explained above, a lack of probable cause is one factor that may support an inference of malice, but a lack of probable cause alone is not sufficient to support that inference. To establish malice, there must be additional evidence beyond the mere lack of probable cause. (*Silas, supra*, 213 Cal.App.4th at pp. 90-91.) Evidence showing the defendant knew its claim lacked probable cause constitutes additional evidence that may support an inference of malice. (*Cole*, *supra*, 206 Cal.App.4th at p. 1114; *Drummond*, *supra*, 176 Cal.App.4th at p. 452.) The evidence Hyperdisk relies on does not show the Bureau knew its claims lacked probable cause.

Hyperdisk's evidence shows the Bureau lacked probable cause because it brought its claims without knowing the contract terms with Hyperdisk, and Pritchett—as the only former or current Bureau employee or representative who knew the contract's terms—twice refused to sign a declaration supporting the Bureau's claims. Hyperdisk, however, failed to present evidence the Bureau knew Pritchett declined to sign the declaration because she knew Hyperdisk properly performed under the contract's terms.

To the contrary, the evidence shows Pritchett did not tell the Bureau why she would not sign the declarations. Indeed, Hyperdisk implicitly concedes it has no evidence to show the Bureau knew it lacked probable cause because Hyperdisk characterizes the Bureau's conduct as reckless rather than intentional.

Hyperdisk also provides a lengthy list of e-mails, documents, and transcripts of testimony that it contends constitutes circumstantial evidence the Bureau acted maliciously in bringing the earlier lawsuit, but in listing this evidence Hyperdisk fails to explain how any particular piece of evidence, or even all of the evidence considered together, establishes malice. (See *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1369 ["'One cannot simply say the court erred, and leave it up to the appellate court to figure out why'"]; *Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 767 ["'This court is not inclined to act as counsel for . . . appellant and furnish a legal argument as to how the trial court's rulings . . . constituted [error]'"]; *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 217-218 ["'It is an established rule of appellate procedure that an appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived'"].)

For example, Hyperdisk cites an e-mail Glen sent shortly after she was hired asking for certain reports and other information about Hyperdisk's contractual performance, and also testimony about the Bureau's "suspension of services without verification" a few weeks later. Nothing on the face of this e-mail or testimony supports an inference the Bureau acted with malice when it filed its lawsuit against Hyperdisk nearly a year and a half after Glen sent her e-mail, and Hyperdisk fails to explain how this e-mail or testimony supports an inference of malice. Similarly, Hyperdisk points to evidence that allegedly shows Fries did not understand Hyperdisk's invoices, and that she failed to meet with Hyperdisk to get answers to her questions about Hyperdisk's services, but Hyperdisk again fails to explain how this purported lack of understanding and diligence shows the Bureau acted maliciously in filing its suit. At most, this evidence

might establish negligence or possibly recklessness by Fries, but as explained above, that is not sufficient to show the Bureau acted with malice in filing its lawsuit. The remainder of Hyperdisk's lengthy list fails to meet its burden to produce evidence the Bureau acted maliciously, and Hyperdisk provides no explanation to show how the evidence it relies on supports an inference of malice.[6]

Moreover, to establish the Bureau acted with malice in filing its lawsuit, the foregoing authorities require Hyperdisk plead and prove the Bureau harbored actual ill will toward Hyperdisk or it initiated the earlier lawsuit for an improper purpose or with an ulterior motive. (*Roger Cleveland*, *supra*, 225 Cal.App.4th at p. 684.) In its brief, Hyperdisk fails to even identify an improper motive or ulterior purpose the Bureau had, let alone make a prima facie showing the Bureau acted with a specific improper motive or purpose in mind. In its complaint, Hyperdisk alleged the Bureau brought its lawsuit to extort money from Hyperdisk by forcing a settlement unrelated to the merits of the Bureau's claims. Hyperdisk abandons that theory on appeal, and the record lacks any evidence to support it. For instance, there is no evidence to show the Bureau made any settlement demand on Hyperdisk. Instead, the record establishes the Bureau pursued its claims through trial, which a party would not do if it brought the claims simply to force a settlement unrelated to the merits of the lawsuit.

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[6] We also point out that Hyperdisk mischaracterizes several items of the evidence it cites. For example, Hyperdisk contends two newspaper articles about the Bureau filing its lawsuit showed the Bureau engaged in a malicious media campaign to impugn Hyperdisk, but the articles simply report the allegations the Bureau made in its complaint. The articles do not quote or attribute any statement about Hyperdisk to the Bureau, and Hyperdisk fails to present any evidence showing the Bureau alerted the media to its lawsuit. Similarly, Hyperdisk points to Hall's statement at a board meeting that he did not expect the dispute to go to court as evidence the Bureau knew it lacked probable cause for its claims or was simply looking for a settlement. Case law, however, recognizes that such comments are typical of parties involved in a lawsuit and are not sufficient to establish malice without more specific evidence regarding an improper motive. (*Roger Cleveland*, *supra*, 225 Cal.App.4th at p. 688.)

Finally, Hyperdisk contends the Bureau acted with malice in filing its lawsuit because there was ill will between the Bureau and Hyperdisk, but the evidence Hyperdisk cites does not support this contention. In support, Hyperdisk cites two pages from Hall's deposition transcript, where he testified Fries and Seghers "did not get along" and "did not care for each other." The lack of cordiality between the Bureau's president and Hyperdisk's president, however, is not sufficient to establish the Bureau's board harbored ill will against Hyperdisk and maliciously filed its lawsuit against the company. To satisfy the malice element based on the existence of ill will, a plaintiff must show the lawsuit was filed primarily because of that ill will, not simply that the parties did not get along. (See *Roger Cleveland*, *supra*, 225 Cal.App.4th at p. 685.) Hyperdisk failed to make this showing.

III

DISPOSITION

The order is reversed. The Bureau shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.